they had not questioned the appellant it is impossible to say.

It has been urged by Mr. Ek Teong that in any event the appellant should have made his complaint on the award being delivered. It seems to me, however, that he chose the proper moment to put forward his complaint when the matter came before the Court for an order that the award be adopted and enforced. I would adopt the remarks made by Bray J. *supra* to the effect that we ought to show our disapproval of the procedure adopted by the arbitrators.

I would allow this appeal with costs, and order that the award be set aside. The deposit will be paid out to the appellant.

Appeal allowed.

Solicitors: *Bannon & Bailey; Braddell & Ramani.*

KANG YEOW HOOI & ORS. v. PUBLIC PROSECUTOR

[C. A. (Mathew C.J., Abbott & Spenser Wilkinson JJ.) October 19, 1954]

[K.L. — Criminal Reference No. 7 of 1954]

Common Gaming Houses Enactment (Cap. 47), s. 11 — Presumption under — Evidence necessary — Lottery — "then in progress" — Interpretation —Elements of distribution and chance must both be present — Offences not mala per se — Sentence.

This was an appeal by way of reference under s. 34 of the Courts Ordinance, 1948. The points specially referred were: (i) the evidence necessary to establish the fact that a lottery is a lottery within the meaning of the Common Gaming Houses Enactment (now Common Gaming Houses Ordinance, 1953); (ii) the interpretation of the phrase "then in progress" under s. 11 of the Common Gaming Houses Enactment (now s. 9 of the Common Gaming Houses Ordinance, 1953).

Counsel for the appellants argued the appeal on two points: (i) the evidence of the expert witness was insufficient to establish that a lottery was being conducted; (ii) if a lottery was being conducted, the presumption under s. 11 that the lottery was then in progress was rebutted.

Held: (1) the essence of a lottery is the distribution of money or money's worth which is determined by lot or chance. The elements of distribution and chance must both be present; (2) it was unnecessary for the Court in the present case to decide at what given moment any particular lottery is concluded, but on the facts of the case, the finding that the lottery was still in progress was correct.

On the question of sentence the Court considered that a sentence of imprisonment for offences of this kind does not necessarily provide a deterrent, and consideration should always be given to the imposition of a substantial fine with a view to avoiding the necessity of sending persons to prison who have committed offences which are not **mala per se**.

Cases referred to:—

(1) *Public Prosecutor v. Lee Ee Teong* (1953) M.L.J. 244.

(2) *Chua Chong Chut & Ors. v. Public Prosecutor* Ipoh — Mag. Cr. App. No. 133 of 1953 — unreported; noted (1954) M.L.J. XXXV.

CRIMINAL REFERENCE.

At about 9.30 p.m. on June 21, 1953, the Police raided a house in Batu Kurau, Taiping, in which they found the three appellants and another man, named Cheah Kooi Sung, each seated at a table with an abacus, slips of paper with figures on them and sums of money. There were also six note-books and nine sheets of paper, wrapped together on the table in front of the 3rd appellant. All four were arrested and charged with assisting in carrying on a 100, 1,000, and 10,000 character public lottery in contravention of section 4(i)(c) of the Common Gaming Houses Enactment (Cap. 47). At the trial an expert witness, Mr. Gee Koh Weng, Chinese Affairs Officer, Penang, gave evidence identifying the documents and note-books as all relating to a 100, 1,000, and 10,000 character lottery "based on the M.C.A. lottery which was drawn on June 21, 1953, at 2.30 p.m." The Treasurer of the local M.C.A. at Taiping proved that the lottery drawing started at 2.30 p.m. and finished at 3 p.m. The prosecution accepted that the lottery had been drawn by 3.30 p.m. at the latest.

The Magistrate accepted the evidence of the expert and held that the presumption under section 11 of the Enactment arose. He also held that the fact that the lottery had been drawn six hours before the Police raid did not rebut the presumption; and for that proposition he relied upon *Chua Chong Chut & Ors. v. Public Prosecutor*[2], an unreported judgment of Thomson J. He convicted all four accused and, in assessing the sentence, he followed another judgment of Thomson J. in Criminal Appeal No. 136 of 1953, in which the learned Judge said, "My reason for taking this course was that the present widespread and flagrant breaking of the law that is going on in connection with this type of lottery is a public scandal and that it is clear that heavy fines alone are not providing a sufficient deterrent." The Magistrate took into consideration against the 1st appellant a previous conviction under the Betting Enactment and sentenced him to 3 months rigorous imprisonment. He considered that the other three accused were "working for" the 1st appellant and sentenced the 2nd appellant to the maximum fine of $3,000 or in default 12 months rigorous imprisonment, and the 3rd appellant to a fine of $1,500 or in default 6 months rigorous imprisonment. The other accused was also fined the maximum fine of $3,000 or in default 12 months rigorous imprisonment but he did not appeal. The appeal was against both conviction and sentence.

At the hearing of the Appeal on June 28, 1954, Buhagiar J. referred the case under the Courts Ordinance to a full Court of Appeal, which sat in Kuala Lumpur on October 4, 1954.

Dato Sir Roland Braddell (with him *Ng Ek Teong*) for the appellants, *inter alia*, cited the following cases on the presumption under section 11: *Public Prosecutor v. Lee Fook* (1932) M.L.J. 126; (1931–2) F.M.S.L.R. 289, *Chan Chan Seng v. Public Prosecutor* (1932) M.L.J. 106; (1931–2) F.M.S.L.R. 332, *Chai Fook v. Public Prosecutor* noted (1949) M.L.J. 61, *Public Prosecutor v. Lee Sin Long* (1949) M.L.J. 51, *Public Prosecutor v. Lee Kay Eng* (1952) M.L.J. 72, *Lee Boon Gan v. Regina* (1954) M.L.J. 103, *Rex v. Latip bin Haidin* (1935) M.L.J. 84; (1935) S.S.L.R. 42.

M. G. Neal (Federal Counsel) for the respondent, was called upon to answer only the second submission made on behalf of the appellants and submitted that a lottery was defined by the Enactment as a distribution of money or money's worth etc. and that until there was such a distribution the lottery remained in force even though the lottery had been drawn.

Cur. Adv. Vult.

Mathew C.J. (delivering the judgment of the Court): —This appeal comes by way of a reference under section 34 of the Courts Ordinance 1948. The points specially referred to us by the learned judge who heard the appeal are:—

1. The evidence necessary to establish the fact that a lottery is a lottery within the meaning of the Common Gaming Houses Enactment (now Common Gaming Houses Ordinance 1953);
2. The interpretation of the phrase "then in progress" under s. 11 of the Common Gaming Houses Enactment (now s. 9 of the Common Gaming Houses Ordinance 1953).

Sir Roland Braddell argued the appeal on two points which were:—

1. The evidence of the expert witness was insufficient to establish that a lottery was being conducted.
2. If a lottery was being conducted, the presumption under s. 11 that the lottery was then in progress was rebutted.

On the first point Sir Roland argued that the evidence of P.W. 2 Gee Koh Weng, Chinese Affairs Officer Penang, did not establish either the nature of the lottery or the chance or lot upon which the money was to be distributed or allotted. He submitted that the evidence was insufficient in itself, and had to be supplemented by the personal knowledge of the trial magistrate. His argument turned largely on the fact that the witness used the expression "are based on" which is vague and does not express with exactitude how the lottery is run. The learned Magistrate, in the submission of Sir Roland, was forced to supplement the evidence of the expert witness by drawing on his own knowledge and experience. Were this so, we would be compelled to quash the conviction, following the decision of Thomson J. in *Public Prosecutor v. Lee Ee Teong*[1].

We have read the evidence of this witness with care, and are satisfied that the witness has described, in terms readily understandable by a person unfamiliar with lotteries in this country, how the lottery was run, and that the result of the lottery was determined not by a draw being made by the lottery promoters themselves but by reference to the result of a Malayan Chinese Association lottery draw. It is perfectly clear that the winning number for the 100 characters is the last two digits of the number of the M.C.A. winning ticket, the last three digits for the 1,000 characters, and the last four digits for the 10,000 characters. The words "based on" were used for describing how the lot or chance was to be determined, and cannot be construed as indicating that the evidence of the expert was not precise.

The charge in respect of which the appellants were convicted was as follows:—

"That you at about 9.30 p.m. on 21st June 1953 at No. 35 Main Road, Batu Kurau, Taiping, did assist in the carrying on of a public lottery to wit 100, 1,000 and 10,000 characters and you have thereby committed an offence punishable under section 4(i)(c) Cap. 47."

They were convicted, in the words of section 4(i)(c) of assisting in the carrying on of a public lottery.

On the second point Sir Roland has argued that if in fact the lottery in question was concluded at 3.30 p.m. by which time the M.C.A. lottery had been drawn and the winning number in the lottery, the subject of the charge, determined, then the appellants cannot be guilty of the offence as charged. If the presumption under section 11 of the Enactment is raised in this case, which in our view it was, then it was to be presumed that the lottery was still in progress at the time the police entered, and it was for the appellants to show that the lottery was at an end. Sir Roland has argued that the presumption under section 11 was in fact rebutted by the evidence of the prosecution, which showed that some hours before the police entered the house the result of the lottery had already been determined by the result of the M.C.A. lottery draw.

It now comes for us to determine whether the lottery the subject of the charge was in progress at 9.30 p.m. on the 21st of June 1953. Sir Roland has submitted that an essential part of a lottery is the element of chance. Once that element has disappeared no lottery can be in existence. It is, we think, necessary to look at the definition of a lottery, which reads:—

"'Lottery' includes any game, method or device whereby money or money's worth is distributed or allotted in any manner depending upon or to be determined by chance or lot . . . . . ". (The underlining is ours).

In our view, the essence of a lottery is the distribution of money or money's worth which is determined by lot or chance. The elements of distribution and chance must both be present. In the present case the element of chance had been determined by the draw of the M.C.A. lottery, but no distribution had taken place. It is unnecessary for us to decide at what given moment any particular lottery is concluded, but in our view of the facts of this case the Magistrate was correct in finding that the lottery was still in progress. We are in agreement with the conclusion reached in the unreported case of *Chua Chong Chut & Ors. v. Public Prosecutor*[2], where in the course of his judgment Thomson J. said :—

"A lottery for the purposes of the Ordinance is defined (s. 2) as including 'any game, method or device whereby money or money's worth is distributed or allotted', and I see nothing repugnant to common sense in saying that such a lottery is in progress until it has been completed, that is to say, until the distribution or allotment of the money or money's worth involved has been itself completed."

For these reasons we dismiss the appeal against conviction.

As regards sentence, Sir Roland has submitted that the sentences were excessive. He pointed out that the first appellant was regarded by the prosecution as the promoter and yet was being less severely punished than his assistants. He did not consider that a sentence of imprisonment was merited in respect of the 1st appellant and that the previous conviction for an offence under the Betting Enactment should not have been taken into consideration.

We do not consider that a sentence of imprisonment for offences of this kind necessarily provide a deterrent, and consideration should always be given to the imposition of a substantial fine with a view to avoiding the necessity of sending persons to prison who have committed offences which are not *mala per se*. We would point out that the sentences of imprisonment in default of payment of the fines in respect of the 2nd and 3rd appellants are not in accordance with section 281 of the Criminal Procedure Code, which only permits of a maximum sentence of 6 months in default where the maximum term of imprisonment for the offence does not exceed two years.

We allow the appeals against sentence, quash the sentences and substitute :—

in respect of the 1st appellant — a fine of $3,000 or six months in default;

in respect of the 2nd appellant — a fine of $2,000 or four months in default;

in respect of the 3rd appellant — a fine of $1,000 or three months in default.

In exercise of our powers of revision, we quash the sentence on the 3rd accused in the original trial and substitute a sentence of a fine of $2,000 or four months in default of payment.

Order accordingly.

Solicitors : *Braddell & Ramani.*

TOH KIM SOO v. REGINA

[A. Cr. J. (Murray-Aynsley C.J.) November 10, 1954]

[Singapore — Magistrate's Appeal No. 174 of 1954]

Liquors Revenue Ordinance (S.S. Cap. 225), s. 83 — Seizure of motor vehicle — Procedure where there is no prosecution — Proof of facts that goods found were intoxicating liquor — Criminal Procedure Code, s. 427.

In this case a motor vehicle had been seized by the customs as the goods found in it were alleged to be "intoxicating liquor". There was no prosecution. Notice was given of the seizure under s. 83(3) of the Liquors Revenue Ordinance and the appellant claimed the vehicle. An enquiry was held and the learned Magistrate found as a result of the enquiry that an offence under the Ordinance had been committed and that the vehicle was used in connection with the offence. He therefore made an order for forfeiture. At the trial, a certificate from the Chief Chemist was admitted to show that the bottles found in the car contained intoxicating liquor.

Held: the certificate was not admissible as s. 427 of the Criminal Procedure Code is limited in its scope to an inquiry, trial or other proceeding under the Code, and therefore the order of the Magistrate must be set aside.

MAGISTRATE'S APPEAL.

G. J. Okell for the appellant.

J. F. McWilliam (Crown Counsel) for the respondent.

Cur. Adv. Vult.

Murray-Aynsley C.J. : — These proceedings arose under section 83 of the Liquors Revenue Ordinance (Cap. 225) and concerned a motor vehicle.

No prosecution took place and the alleged liquor and the vehicle were found without an apparent owner. Notice was given under section 83 (3) and the present appellant claimed the vehicle. The Ordinance does not say what is to be done in such a case, but the Magistrate proceeded to hear and determine the issue as to whether an offence under the Ordinance had been committed and as to whether the vehicle had been used in connection with such offence. On the strength of his findings he made an order for forfeiture.

Assuming the procedure to be correct, the only question is whether his findings of fact were justified. Substantially the points to be considered are whether there was evidence that the goods seized were intoxicating liquors within the meaning of section 2 of